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SUMMARY

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Federal Sentencing: How Much May the Judge Decide - The Impact of the Supreme Court's Decision in Apprendi v. New Jersey

In Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000), the Supreme Court held "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," 120 S.Ct. at 2355.

In earlier cases, the Court had held that proof beyond a reasonable doubt is a due process prerequisite for conviction; that the burden of proving any element of a crime may not be shifted to the defendant, although the defendant may be afforded the benefit of establishing a lesser included offense; that mandatory minimum penalties may be established and imposed; and that the fact of prior conviction may be used to increase as much as ten fold the penalty for the offense found by the jury.

Following the decision, the lower federal courts have held that (1) the rule applies to federal drug trafficking cases and other cases under similar statutes, (2) it does not apply to the use of prior convictions as a sentencing factor, (3) it does not bar the use of mandatory minimum sentencing procedures unless the statutory maximum penalty for the underlying crime is exceeded, (4) it does not invalidate the federal sentencing guidelines, (5) its retroactive application to past cases is limited, and (6) even when the rule applies an earlier sentence may be allowed to stand if the fact improperly withheld from the jury is admitted, indisputable, or inconsequential.

Contents

Federal Sentencing: How Much May the Judge Decide - The Impact of the Supreme Court's Decision in Apprendi v. New Jersey

Introduction

In *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the Supreme Court called into question the sentencing role of federal judges. At the very least, the decision has required alterations in the manner in which federal drug statutes and similar provisions are prosecuted, and it may herald the demise of the federal sentencing guidelines.

Apprendi holds that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," 120 S.Ct. at 2355. The Court's sharp change of direction and the slim and fragile nature of the consensus among the members of the majority make predictions perilous. It is therefore perhaps not surprising that the various federal appellate courts have thus far construed *Apprendi* narrowly.

Winship and its progeny

Apprendi is the latest in a line of cases that begins with *Winship*, where the Court expressly confirmed that due process demands the guilt of an accused be found "beyond a reasonable doubt," *In re Winship*, 397 U.S. 358, 364 (1970). In doing so, it declared that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged," id.* (emphasis added).

Conviction cannot be had, it later explained, by requiring the defendant to prove the absence of one of the elements of the crime with which he is charged. Thus, for example, a state may not require an accused to prove that he acted in the heat of passion (*i.e.*, with an absence of malice aforethought) and therefore is not guilty of murder (for which malice aforethought is an element) but only of manslaughter, *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975).

Due process in this context is focused upon the prosecutor's responsibility to prove each of the crime's elements beyond a reasonable doubt. Due process is not offended if the defendant must prove the existence of a lesser included offense rather than the more serious offense with which he was charged. So, a state may outlaw the intentional killing of another as murder, but allow the accused to claim guilt under a less severely punished crime when he can show by a preponderance of the evidence

that he acted under the influence of extreme emotional disturbance, *Patterson v. New York*, 432 U.S. 197, 205-7 (1977).[1]

Still focused upon the prosecutor's responsibility to prove each of the crime's elements, the Court held that once the prosecution has done so no denial of due process occurs simply because the defendant, convicted of the crime, is subject to a mandatory minimum sentence based upon the prosecution's proof to the court (not the jury) of an additional sentencing factor (by a preponderance of the evidence and not beyond a reasonable doubt), *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986).[2]

Moreover, these sentencing factors could be used to enhance the maximum penalties as well as to establish a minimum penalty. Thus, a majority of the Court saw no constitutional impediment in a statutory scheme that raised the maximum penalty of a crime from 2 years to 20 years based on the presence of a particular sentencing factor to be established to the court's satisfaction by a preponderance of the evidence after conviction, *Almandarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998).[3]

Even in capital punishment cases where due process standards are sometimes insufficient to satisfy constitutional requirements for imposition of that unique penalty, the Court held that the judge as well as the jury may be entrusted with the task of determining the existence of aggravating factors necessary to justify execution, *Walton v. Arizona*, 497 U.S. 639, 647 (1990).

Logical though it may have been in light of the Court's precedents, a majority of the Court's members became uneasy with the implications of *Almandarez-Torres*

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[1] New York defined the crime of second degree murder as intentionally killing another, N.Y.Penal Law §125.25 (1975); it outlawed as manslaughter intentionally killing another "under the influence of extreme emotional disturbance," N.Y.Penal Law §125.20 (1975). It gave a defendant accused of second degree murder an affirmative defense under which he would be considered guilty only of the lesser offense of manslaughter if he could establish that he killed under "the influence of an extreme emotional disturbance," N.Y.Penal Law §125.25 (1975).

[2] The *McMillan* procedure exposed anyone convicted of various designated offenses to a mandatory minimum term of imprisonment for five years if the sentencing judge found by a preponderance of the evidence that the defendant had brandished a firearm during the commission of the offense.

[3] Subsection (a) of 8 U.S.C. 1326 makes it a crime for deported aliens to reenter the United States without special permission. Offenders are subject to imprisonment for not more than 2 years, unless prior to deportation they had been convicted of aggravated felony in which case they are subject to imprisonment for not more than 20 years, 8 U.S.C. 1326(b)(2). Almandarez-Torres had entered a plea of guilty to a charge of violating subsection 1326(a), but argued that the "sentencing factor" of a prior conviction must in fact be considered an element of a separate crime which, in order to comply with the Fifth Amendment, had to be charged in the indictment. The Court did not agree, "We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution require the government to charge the factor that it mentions, an earlier conviction, in the indictment," 523 U.S. at 226-27.

almost immediately.[4] They began with an arguably strained statutory interpretation in which they characterized various statutory factors as elements rather than sentencing factors. They did so they explained because otherwise the statutes might be considered constitutionally suspect.

Jones v. United States, 526 U.S. 227 (1999), presented facts similar to those in *Almendarez-Torres*. Jones was indicted and convicted of carjacking in violation of 18 U.S.C. 2119. Conviction carried a sentence of imprisonment for not more 15 years, 18 U.S.C. 2119(1), but the maximum sentence was increased to 25 years if the offense resulted in serious bodily injury, 18 U.S.C. 2119(2), and to life imprisonment if the offense resulted in death, 18 U.S.C. 2119(3).[5] Neither the indictment nor the instructions to the jury made any mention of bodily injury, but the presentence report did and recommended a sentence of 25 years which the trial court imposed. The Court of Appeals affirmed, *United States v. Jones*, 60 F.3d 547 (9th Cir. 1995); the Supreme Court, in a 5-4 decision, reversed.

The Court concluded that the statute did not create a single crime with three possible sentences. Instead it created three separate crimes each with its own penalty, *i.e.*, simple carjacking (not more than 15 years); carjacking where serious bodily injury results (not more than 25 years); and carjacking where death results (life imprisonment). It observed, however, that "[w]hile we think the fairest reading of §2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view. Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule repeatedly affirmed, that where a statute is suspectable of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter," 526 U.S. at 239.

To find otherwise, the Court believed, might bring it into conflict with the principle that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," 526 U.S. at 243 n.6.

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[4] Since the *Apprendi* majority consisted of the four dissenting Justices in *Almendarez-Torres* and Justice Thomas, it might be more accurate say that four Justices remained uneasy and a pivotal fifth Justice began to question the wisdom of *Almendarez-Torres*.

[5] "Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall--

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death," 18 U.S.C. 2119.

Apprendi

Apprendi confirms the constitutional suggestions in *Jones*.[6] Apprendi was convicted of shooting into the home of his African-American neighbors. There was evidence, which Apprendi disputed, that his crime was motivated by racial animus, *Apprendi v. New Jersey*, 120 S.Ct. at 2351, citing, *Apprendi v. State*, 159 N.J. 7, 10, 731 A.2d 485, 486 (1999). Under New Jersey law, possession of a firearm for an unlawful purpose is a second degree crime, N.J.Stat.Ann. §2C:39-4.a., and, unless otherwise provided, is punishable by imprisonment for a term fixed at between 5 and 10 years, N.J.Stat.Ann. §2C:43-6.a.(2). A second degree crime, however, carries an extended term of imprisonment if the court finds that it was committed by a defendant "acting with a purpose to intimidate an individual or group of individuals because of race . . ." N.J.Stat.Ann. §2C:44-3.e. A second degree crime found to have been committed under such circumstances carries a term of imprisonment fixed at between 10 and 20 years, N.J.Stat.Ann. §2C:43-7.a.(3).

Apprendi plead guilty under a multicount indictment which nowhere mentioned either the hate crime sentencing enhancement statute or the allegations which supported its application, 120 S.Ct. at 2352. Nevertheless, in the plea agreement the prosecution reserved the right to seek the hate crime enhancement and Apprendi reserved the right to challenge its constitutionality, *id.* The trial court sentenced Apprendi to a hate-crime-enhanced term of 12 years on one of the unlawful possession counts (which otherwise would have carried a maximum term of 10 years) and rejected his constitutional arguments; the New Jersey appellate courts affirmed, *Apprendi v. State*, 304 N.J.Super. 147, 698 A.2d 1265 (1997), *aff'd*, 159 N.J. 7, 731 A.2d 485 (1999).

The Supreme Court, in a decision written by Justice Stevens and joined by Justices Scalia, Thomas, Souter and Ginsburg, reversed and remanded, 120 S.Ct. 2348. The Court declared that the jury trial and notification clauses of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments[7]

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[6] Only few weeks prior to *Apprendi*, a near unanimous Court announced, *Castillo v. United States*, 120 S.Ct. 2090 (2000), another elements-or-sentencing-factor decision in which the Court appeared hesitant to pursue the *Jones'* broad implications. "The statute in question, 18 U.S.C. 924(c), prohibit[ed] the use or carrying of a firearm in relation to a crime of violence, and increase[d] the penalty dramatically when the weapon used or carried is, for example, a machinegun," 120 S.Ct. at 2091 (internal quotation marks omitted) In doing so, the Court concluded, subsection 924(c) created a series of crimes in which the presence of a machinegun or one of the other sentence-escalating weapons was an element, *id.* Although some might not find this construction no more compelling than the one produced in *Jones* (the text of 924(c) is appended), the Court did: "this [is] a stronger separate crime case than either *Jones* or *Almendarez-Torres* -- cases in which we were closely divided as to Congress' likely intent," 120 S.Ct. at 2096. Other than possibly this reference to *Jones, Castillo* neither speaks nor hints of a construction driven by the specter of unconstitutionality. The Court might have confirmed *Jones* in *Castillo*, but *Apprendi*, a state case, provides a broader base.

[7] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation. . . ." U.S.Const. Amend. VI; "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." U.S.Const. Amend.V. These rights, thus guaranteed against the

embody a principal that insists that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt," 120 S.Ct. 2362-363.

Justice Thomas, together with Justice Scalia, agreed but added a concurrence that suggests they would have gone further.[8] Justice O'Connor wrote a dissent in which she was joined by Chief Justice Rehnquist and Justices Breyer and Kennedy, 120 S.Ct. at 2380. At the heart of the dissent lies the belief that the majority have announced as constitutional mandate a rule that the Constitution does not require.[9] Justice Breyer and Chief Justice Rehnquist joined in an additional separate dissenting opinion, arguing the benefits of judicial participation in sentencing, 120 S.Ct. at 2396, a view whose constitutional foundations Justice Scalia questions in a separate concurrence, 120 S.Ct. at 2367.

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federal government, are made binding upon the states by the due process clause of the Fourteenth Amendment: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

The Fifth Amendment also insists that "[n]o persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." Historically, this Fifth Amendment right to grand jury indictment has not been counted among those rights encompassed within the concept of due process, however, and therefore has not been considered binding upon the states, *see e.g., Hurtado v. California*, 110 U.S. 516 (1884). *Apprendi's* tentative acknowledgement might seem to invite re-examination: "Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the 'due process of law' that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, and the right to have every element of the offense proved beyond a reasonable doubt. That Amendment has not, however, been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' that was implicated in our recent decision in *Almendarez-Torres v. United States*. We thus do not address the indictment question separately today," 120 S.Ct. at 2356 n.3 (citations omitted).

[8] "This case turns on the seemingly simple question of what constitutes a crime . . . . All of [the] constitutional protections turn on determining which facts constitute the crime -- that is, which facts are the elements or ingredients of a crime . . . . [Historic] authority establishes that a crime includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)," 120 S.Ct. at 2367-268.

[9] "I do not believe that the Court's 'increase in the maximum penalty' rule is required by the Constitution . . . . Last Term, in *Jones v. United States*, 526 U.S. 227 (1999), this Court found that our prior cases suggested the following principle: '[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' Id., at 243, n. 6. At the time, Justice Kennedy rightly criticized the Court for its failure to explain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the Federal Government and States alike. Id., at 254, 264-272 (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in Jones," 120 S.Ct. at 2395, 2380.

Impact.

The consequences of *Apprendi* are substantial and potentially enormous. Its most obvious and immediate impact is upon federal drug sentencing practices. Section 841(a) of title 21 of the United States Code outlaws trafficking in controlled substances. As a general rule, trafficking in heroin, cocaine and other schedule I or II controlled substances is punishable by imprisonment for not more than 20 years, 21 U.S.C. 841(b)(1)(C). Trafficking in large amounts of these controlled substances (*e.g.*, 100 grams of heroin) can increase the maximum penalties to imprisonment for not less than 5 nor more than 40 years (not less than 10 years nor more than life for repeat offenders), 21 U.S.C. 841(b)(1)(B), and trafficking in very large amounts (*e.g.*, a kilogram or more of heroin) raises the penalties to imprisonment for not less than 20 years nor more than life, 21 U.S.C. 841(b)(1)(A).[10]

Prior to *Apprendi*, an accused was entitled to a jury determination of his guilt under section 841, but questions of the amount of the substance involved were considered sentencing factors to be decided by the judge.[11] Subject to a few exceptions, *Apprendi* has changed all that. The sentencing factors of section 841 and its equivalents are now elements of separate offenses to be charged in the indictment and found by the jury beyond a reasonable doubt.[12]

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[10] The full text of 18 U.S.C. 841(a) and 841(b)(1) are appended.

[11] *United States v. Angle*, 230 F.3d 113, 122 (4th Cir. 2000)("Historically, this court and all of her sister circuits have held that drug quantity is a sentencing factor, not an element of the crime. *See United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989); *United States v. Thomas*, 204 F.3d 381, 384 (2d Cir. 2000); *United States v. Hester*, 199 F.3d 1287, 1291 (11th Cir. 2000); *United States v. Williams*, 194 F.3d 100, 107 (D.C.Cir. 1999); *United States v. Mabry*, 3 F.3d 244, 250 (8th Cir. 1993); *United States v. Underwood*, 982 F.2d 426, 429 (10th Cir. 1992); *United States v. Oreno*, 899 F.2d 465, 472-73 (6th Cir. 1990); *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Gibbs*, 813 F.2d 596, 599-600 (3d Cir. 1987); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Normandeau*, 800 F.2D 953, 9565 (9th Cir. 1986)").

[12] *See e.g., United States v. Angle*, 230 F.3d 113, 123 (4th Cir. 2000)("Pursuant to *Apprendi*, in order for imprisonment penalties under 841(b)(1)(A) or (B) to apply to the defendants, such that findings of particular drug quantities could expose them to imprisonment terms greater than §841(b)(1)(C)'s catch-all statutory maximum of twenty years, the drug quantity must be treated as an element: charged in the indictment, submitted to a jury, and proved to beyond a reasonable doubt"); *United States v. Doggett*, 230 F.3d 160, 164 (5th Cir. 2000); *United States v. Rebmann*, 226 F.3d 521, 524-25 (6th Cir. 2000); *United States v. Nance*, 236 F.3d 820, 824-25 (7th Cir. 2001); *United States v. Aguayo-Delgado*, 220 F.3d 926, 932-33 (8th Cir. 2000); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000); *United States v. Hishaw*, 235 F.3d 565, 574-75 (10th Cir. 2000); *United States v. Rogers*, 228 F.3d 1318, 1327-328 (11th Cir. 2000); *United States v. Fields*, __ F.3d. __, __ (D.C.Cir. 3-13-01).

Section 841 is just one of a host of federal statutes which outlaw a particular type of misconduct and then provide an escalating series of penalties when certain aggravating factors such as serious bodily injury are present. In the case of most statutes, these escalating factors were considered sentencing factors assigned to the domain of the judge rather than the jury, but are now subject to the right to jury determination and proof beyond a reasonable doubt. A list of the federal statutes transformed by *Apprendi* is appended.

"Other than the fact of a prior conviction. . ."

Apprendi, however, limits its sweep, at least for the time being. It creates an unmistakable recidivism exception: "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury. . . ." 120 S.Ct. at 2362-363 (emphasis added). The limitation is not inadvertent, but it is hardly warmly embraced. Both Justice Steven's opinion for the Court and Justice Thomas' concurrence imply that *Almandarez-Torres*, upon which the exception is based, was probably incorrectly decided.[13]

Nevertheless if only for now, *Almandarez* remains the law, and post-*Apprendi* courts continue to hold that recidivism is a valid sentencing factor that may be used to increase a defendant's sentence beyond the maximum term that would otherwise apply even if the prior conviction is neither mentioned in the indictment nor presented to the jury.[14]

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[13] "Finally, as we made plain in *Jones* last Term, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), represents at best an exceptional departure from the historic practice that we have described. . . . . Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset," 120 S.Ct. at 2361, 2362.

"Second, and related, one of the chief errors of *Almendarez-Torres*--an error to which I succumbed--was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. 523 U.S., at 243-244; see *id.*, at 230, 241. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment--for establishing or increasing the prosecution's entitlement--it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in *Almendarez-Torres, supra,* at 235, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction," 120 S.Ct. at 2379.

[14] *See e.g., United States v. Martinez-Villalva*, 232 F.3d 1329, 1331 (10th Cir. 2000)("In *Apprendi*, the Supreme Court held that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' As defendant correctly concedes, the *Apprendi* Court made it clear that its holding is subject to a narrow exception and it is not applicable when the sentence-enhancing fact is a prior conviction, as in this case. . . .The *Apprendi* Court specifically declined to revisit or overturn *Almendarez-Torres*. . . . This case falls squarely within the exception to the *Apprendi* holding and is governed by *Almendarez-Torres*"); *accord, United States v. Guadmuz-Solis*, 232 F.3d 1363, 1363 (11th Cir. 2000); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 413-14 (9th Cir. 2000); *United States v. Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000); *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000); *United States v. Latorre-Benavides*, __ F.3d __, __ (2d Cir. 2-26-01); *United*

". . . increases the penalty . . . beyond the prescribed statutory maximum. . ."

The second distinct limitation of the *Apprendi* rule is its deference to the statutory maximum. The restriction has obvious implications. First, it permits judicially determined and imposed mandatory minimum sentences, as long as they do not exceed the maximum penalty imposed by statute. Second, it leaves the federal sentencing guidelines unimpaired. Finally, it lets stand previously imposed sentences, grounded upon erroneous assumptions of law, which nevertheless came to rest within the applicable statutory maximum.

Apprendi disposes of any potential challenge to the validity of mandatory minimum sentences that do not exceed statutory ceilings by recasting *McMillan*: "We limit [*McMillan's*] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," 120 S.Ct. at 2361 n.13. The point has not been lost on subsequent federal appellate panels.[15]

States v. Terry, 240 F.3d 65, 73-4 (1st Cir. 2001); *United States v. Powell*, 109 F.Supp.2d 381, 383-84 (E.D.Pa. 2000); *United States v. Gebele*, 117 F.Supp.2d 540, 548-49 (W.D.Va. 2000).

[15] *See e.g., United States v. Aguayo-Delgado*, 220 F.3d 926, 933-34 (8th Cir. 2000)("The rule of *Apprendi* only applies where the non-jury factual determination increases the maximum sentence beyond the statutory range authorized by the jury's verdict. If the non-jury factual determination only narrows the sentencing judge's discretion within the range already authorized by the offense of conviction, such as with the mandatory minimums applied to Aguayo-Delgado, then the governing constitutional standard is provided by *McMillan*. As we have said, *McMillan* allows the legislature to raise the minimum penalty associated with a crime based on non-jury factual findings, as long as the penalty is within the range specified for the crime for which the defendant was convicted by the jury. *Apprendi* expressly states that *McMillan* is still good law, though limited in application. . . ."); *see also*, *United States v. Houle*, 237 F.3d 71, 80 (1st Cir. 2001); *United States v. Meshack*, 225 F.3d 556, 576 (5th Cir. 2000); *United States v. Smith*, 223 F.3d 554, 565-66 (7th Cir. 2000); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000).

The Sixth Circuit has come to a somewhat different conclusion. *United States v. Flowal*, 234 F.3d 932, 936-38 (6th Cir. 2000) overturned a mandatory sentence of life imprisonment predicated on the lower court's preponderance of the evidence findings of the quantity of cocaine involved in the offense and defendant's two prior convictions. In addition to the fact that sentence exceeded the applicable statutory maximum of the offense found by the jury without reference to the quantity of cocaine involved (30 years) and thus triggered *Apprendi* considerations, the panel expressed concern that "the district court gave Flowal a mandatory maximum (sic) sentence that might not have actually been mandatory or even permissible had the district court properly submitted the issue of the drug's weight to the jury." A later panel read the additional comment as more than mere dicta. *United States v. Ramirez*, _ F.3d __, __ (6th Cir. 2-16-01) faced a defendant who had been sentenced to a mandatory minimum sentence of twenty years which the lower court felt compelled to impose because of its finding that the offense involved 10 kilograms of cocaine. Unlike *Flowal*, the sentence imposed was less than the maximum that might have been imposed without reference to weight of the cocaine (again 30 years because of a prior conviction). Nevertheless, the *Ramirez* declared that "the narrow question before us in the instant case is whether the rights

Apprendi seems to forego coverage of the federal sentencing guidelines by setting its rule to work beyond the applicable statutory maximum, knowing that the sentencing guidelines operate only up to that maximum, U.S.S.G. §5G1.1(a). The *Apprendi* dissenters, however, sense this result may be in conflict with *Apprendi*'s underlying rationale. "The actual principle underlying the court's decision," the dissent opines, "may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt," 120 S.Ct. at 2391 (O'Connor, J., dissenting). If so the dissenters speculate, "[t]he principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal sentencing guidelines)," *id.*

And they add, Justice Thomas' concurrence appears to endorse this construction when he "essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the sentencing guidelines," 120 S.Ct. at 2391 (O'Connor, J. dissenting). In fact, neither Justice Stevens in his opinion for the Court nor Justices Thomas nor Scalia in their concurrences offer a great deal to allay the dissent's concerns. The Court notes that the issue was not before it and that guideline sentences must fall within the maximum prescribed by statute.[16] Justice Thomas observes that the impact on the guidelines need not be addressed, but sounds ambivalent on the merits of the issue.[17] Justice Scalia, who joins in Justice Thomas' concurrence, writes separately to emphasize the constitutional necessity of jury fact-

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discussed in *Apprendi* are triggered by the drug statute's progression of increased mandatory minimum penalties based in part on the quantity of drugs possessed. We recently decided this issue in *United States v. Flowal* . . . . Another way of stating the same point in the language of *Apprendi* is to say that the assessment of acts that increase the prescribed range of penalties to which a criminal defendant is exposed, such as moving up the scale of mandatory minimum sentences, invokes the full range of constitutional protections required for elements of the crime." In spite of prompting in a *Ramirez* concurrence, neither panel explains the apparent inconsistency between its holdings and *Apprendi*'s reformulation of *McMillan* which sanctions statutes that impose mandatory minimums that do not exceed the statutory maximum.

[16] "The principal dissent, in addition, treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. *See, e.g., Edwards v. United States*, 523 U.S. 511, 515 (1998) (opinion of Breyer, J., for a unanimous court) (noting that '[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines,'" 120 S.Ct. at 2366.

[17] "It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under *Mistretta v. United States*, 488 U.S. 361 (1989). But it may be that this special status is irrelevant, because the Guidelines 'have the force and effect of laws.' *Id.*, at 413 (Scalia, J., dissenting)," 120 S.Ct. at 2380 n.11 (Thomas, J., concurring) .

finding rather than the guideline-assisted judicial fact-finding which he sees favored in Justice Breyer's dissent.[18]

Be that as it may, the *Apprendi* rule, at least in its present form, begins where the sentence guidelines end, at the maximum penalty prescribed by statute. Later cases have rejected the contention that operation of the guidelines contravenes the *Apprendi* rule.[19]

There is one other consequence of *Apprendi*'s deference to statutory maximums. Federal appellate courts, pointing to this aspect of *Apprendi,* have declined to overturn sentences, imposed before *Apprendi* was handed down, that fall beneath the applicable statutory maximum even if they were otherwise imposed contrary to the *Apprendi* rule.[20]

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[18] "I feel the need to say a few words in response to Justice Breyer's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State— and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free," 120 S.Ct. at 2367 (Scalia, J. concurring).

[19] *United States v. Kinter*, 235 F.3d 192, 199-201 (4th Cir. 2000)("In the case before us, the sentencing judge determined, under the preponderance standard, that Kinter paid more than one bribe and that Washington Data's profit was $9.6 million -- findings that required the court to impose a sentence of between 46 and 57 months. In the absence of these findings, the maximum punishment allowable under the sentencing guidelines . . . would have been 10 months. Kinter therefore contends that *Apprendi* required those two facts to be submitted to a jury and proven beyond a reasonable doubt before they could form the basis of an enhancement of his sentence. This contention essentially boils down to an argument that *Apprendi* renders much, if not all, of the current sentencing practices under the sentencing guidelines unconstitutional. . . .[But t]he *Apprendi* Court . . . explicitly limited its holding to factual determinations 'that increase the penalty for a crime beyond the prescribed statutory maximum' . . . Because *Apprendi* does not apply to a judge's exercise of sentencing discretion within a statutory range, the current practice of judicial factfinding under the Guidelines is not subject to the *Apprendi* requirements -- at least so long as that factfinding does not enhance a defendant's sentence beyond the maximum term specified in the substantive statute"); *see also*, *United States v. White*, 240 F.3d 127, 136 (2d Cir. 2001); *Hernandez v. United States*, 226 F.3d 839, 841-42 (7th Cir. 2000); *United States v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United States v. Keeling*, 235 F.3d 533, 536 (10th Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000); *United States v. Williams*, 235 F.3d 858, 863 (3d Cir. 2000); *cf.*, *United States v. Boucha*, 236 F.3d 768, 770 n.1 (6th Cir. 1-17-01).

[20] *United States v. Chavez*, 230 F.3d 1089, 1091 (8th Cir. 2000)("Chavez was convicted of possession with intent to distribute methamphetamine, two counts of distribution of methamphetamine, and conspiracy to distribute methamphetamine. The statutory maximum for each of these crimes, even assuming the minimum quantities of methamphetamine found by the jury, is a life sentence. . . . Therefore, because none of Chavez's sentences exceeds the statutory maximum, *Apprendi* is inapplicable"); *United States v. Houle*, 237 F.3d 71, 80-1 (1st Cir. 2001); *United States v. Champion*, 234 F.3d 106, 109 (2d Cir. 2000); *United States v. Cepero*, 224 F.3d 256, 267 n.5 (3d Cir. 2000); *United States v. Angle*, 230 F.3d 113, 123 (4th Cir. 2000); *United States v. Meshack*, 225 F.3d 556, 575-77 (5th Cir. 2000); *United*

Capital Punishment and Other Procedural Questions

Although the Court's capital punishment jurisprudence may sometimes call for more process than is due in due process cases, *Apprendi* does not abrogate the Court's existing construction under which the Constitution is said to permit assignment of the ultimate sentencing decision to either judge or jury. The exception stands on two critical distinctions. First, in capital punishment cases the sentencing decision follows a jury determination of guilt on a capital offenses, *i.e.*, the maximum penalty for the crime of conviction is death.[21] Moreover, the Eighth Amendment elaborately supplements the jury's role in capital cases with a wide range of additional safeguards.[22]

Apprendi deals with sentences, that is with punishment, and so it might be thought to apply to sentences in any form but not necessarily to the remedial repercussions of conviction. Nevertheless, some consequences of conviction which

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States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000); *Talbott v. Indiana*, 226 F.3d 866, 869 (7th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026 (9th Cir. 2000); *United States v. Thompson*, 237 F.3d 1278, 1261-262 (10th Cir. 2001); *United States v. Gerrow*, 232 F.3d 831, 834 (11th Cir. 2000).

[21] "[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990); *id.*, at 709-714 (Stevens, J., dissenting). For reasons we have explained, the capital cases are not controlling: 'Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.' *Almendarez-Torres*, 523 U.S., at 257, n. 2 (SCALIA, J., dissenting) (emphasis deleted). *See also Jones*, 526 U.S., at 250-251; *post*, at 2379-2380 (Thomas, J., concurring)," 120 S.Ct. at 2366.

[22] "Finally, I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton v. Arizona,* 497 U.S. 639, 647-649 (1990). See *ante,* at 2365-366. *Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for in the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment--we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide--as, previously, it freely could and did--that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day," 120 S.Ct. at 2380 (Thomas, J., concurring).

might have been considered remedial, such as supervised release,[23] are bound by the *Apprendi* rule;[24] while others which might have been considered punitive, such as criminal forfeiture,[25] are not.[26]

Retroactive Application

Apprendi says nothing of its possible retroactive application. May those already convicted claim the benefits of its new rule of constitutional interpretation? Judge-found sentencing factors have become a feature common to both state and federal criminal justice systems. Must all of the sentences imposed under those systems be re-examined? The answer thus far has been mixed, but predictably so.

Apprendi has been found to apply to cases pending on direct appeal when it was handed down[27] Yet, *Apprendi* does not require resentencing in these cases if the

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[23] *United States v. Balogun*, 146 F.3d 141, 146 (2d Cir. 1998)("The legislative history makes plain that Congress intended the supervised release term to be used not to punish the defendant . . . but rather to ease the defendant's transition into the community . . . or to provide rehabilitation. . ."); *United States v. Joseph*, 109 F.3d 34, 38 (1st Cir. 1997)("Rather than being punitive, supervised release is intended to facilitate the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct").

[24] *United States v. Keeling*, 235 F.3d 533, 535 (10th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 934 (8th Cir. 2000); *United States v. Meshack*, 225 F.3d 556, 578 (5th Cir. 2000); *United States v. Pratt*, 239 F.3d 640, 646-48 (4th Cir. 2001). The issue here is further complicated by the fact that the Circuits are divided over the maximum permissible term of supervised release in drug cases. Subsection 841(b)(1)(C), the subsection applicable without regard to the weight of the drugs involved, calls for a 3 year minimum term of supervised release; section 3583 of title 18 establishes a 3 year maximum term of supervised release for violations of statutes such as subsection 841(b)(1)(C) unless "otherwise provided." Some courts read subsection 841(b)(1)(C) as otherwise providing so that the permissible range of release terms is from 3 years to life; others read the two section together and conclude that permissible term is 3 years, no more and no less, *Twenty-Ninth Annual Review of Criminal Procedure: Supervised Release*, 88 GEORGETOWN LAW JOURNAL 1549, 1551 (2000).

[25] *Libretti v. United States*, 516 U.S. 29, 41 (1995) ("The fact that the Rules attach heightened procedural protections to imposition of criminal forfeiture as punishment for certain types of criminal conduct cannot alter the simple fact that forfeiture is precisely that: punishment").

[26] *United States v. Corrado*, 227 F.3d 543, 550 (6th Cir. 2000)("we reject the defendants' argument that the jury must decides the extent of forfeiture or that the district court, as the agreed trier of fact, must make fact determinations based on the beyond a reasonable doubt standard. *See United States v. DeFries*, 129 F.3d 1293 (D.C.Cir. 1997)(recognizing that under *Libretti*, the government must prove its forfeiture allegations by a preponderance of the evidence)") (suggesting that *Apprendi*'s failure to address *Libretti* means that *Apprendi* intended to leave untouched *Libretti*'s seemingly inconsistent determination that there is no constitutional right to a jury verdict on the punishment of criminal forfeitability which may be decided by the trial judge under a preponderance of the evidence standard).

[27] *United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000); *United States v. Keeling*, 235 F.3d 533, 538 (10th Cir.

defendant failed to raise the issue at trial as long as the sentence-enhancing fact withheld from the jury's appraisal was conceded, indisputable, or inconsequential.[28]

Defendants who have exhausted their direct appeals must overcome the general rule that new constitutional interpretations will not be applied in habeas corpus cases unless the interpretation either renders a substantive criminal law unenforceable or constitutes a "watershed" interpretation of criminal procedure.[29] The obstacles for defendants who have previously filed for habeas relief are even more substantial. They may proceed only with the permission of a federal appellate court which may grant the petition only after the Supreme Court makes *Apprendi* retroactive to cases on collateral review.[30]

2000); and *United States v. Anderson,* 236 F.3d 427, 429 (8th Cir. 2001), each citing, *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending or direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past").

[28] *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000)(no evidence that could lead to a contrary conclusion); *United States v. Keeling*, 235 F.3d 533, 539-40 (10th Cir. 2000)(evidence overwhelming); *United States v. Anderson,* 236 F.3d 427, 430 (8th Cir. 2001)(evidence undisputed); *United States v. Jackson*, 236 F.3d 886, 888 (7th Cir. 2001)(evidence of the *Apprendi*-critical fact was overwhelming); *United States v. page*, 232 F.3d 536, 544-45 (6th Cir. 2000)(defendants erroneously sentenced to two concurrent 30 year terms were not prejudiced since on remand the sentencing guidelines would require that they be sentenced to consecutive terms totaling thirty years); *United States v. Slaughter*, 238 F.3d 580, 583-84 (5th Cir. 2000)(jury was not instructed on the need to find a particular quantity of drugs, but the indictment counts which they had before them and whose charges they found beyond a reasonable doubt identified particular amounts); *United States v. White*, 238 F.3d 537, 542-43 (4th Cir. 2001)(defendant was not prejudiced by concurrent, *Apprendi*-tainted sentences (each in excess of the statutory maximum) when the sentencing guidelines would otherwise have required *Apprendi*-pure consecutive sentencing (each beneath the statutory maximum but yielding in the aggravate the same final term); *United States v. Champion*, 234 F.3d 106, 110 (2d Cir. 2000)(defendant stipulated the quantity of drugs); *United States v. Castillo*, 229 F.3d 292, 307 (1st Cir. 2000)(failure to submit the sentence-enhancing fact that the weapons used by the robbers were semiautomatic assault weapons was not plain error where the trial featured extensive, contested evidence that the robbers used AK-47 rifles).

[29] *Jones v. Smith*, 231 F.3d 1227, 1236-238 (9th Cir. 2000)(holding that *Apprendi* does not come within either exception and citing *Teague v. Lane*, 489 U.S. 288, 311 (1989)(plurality opinion); and *Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994); *cf.*, *Browning v. United States*, __ F.3d __, __ (10th Cir. 3-1-01).

[30] 28 U.S.C. 2244(b)((2)(A), 2255 ¶8(2); *United States v. Rodgers*, 229 F.3d 704, 706 (8th Cir. 2000)("a new rule of constitutional law has been made retroactive to cases on collateral review . . . within the meaning of §2255 [or §2244] only when the Supreme Court declares the collateral availability of rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding. Nowhere in the *Apprendi* decision itself, or in any subsequent decision, does the Supreme Court discuss *Apprendi*'s retroactivity"); *see also, Sustache-Rivera v. United States*, 221 F.3d 8, 15-7 (1st Cir. 2000); *In re Tatum*, 223 F.3d 857, 858-59 (5th Cir. 2000); *Talbott v. State of Indiana*, 226 F.3d 866, 868-70 (7th Cir. 2000); *Browning v. United States*, __ F.3d __, __ (10th Cir. 3-1-01); *In re Joshua*, 224 F.3d 1281, 1283 (11th Cir. 2000).

Appendices

21 U.S.C. 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving-- (i) 1 kilogram or more of . . . heroin; (ii) 5 kilograms or more of . . . cocaine; (iii) 50 grams or more of . . . cocaine base [crack]; (iv) 100 grams or more of . . .PCP; (v) 10 grams or more of . . . LSD; 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide (synthetic heroin) . . . (vii) 1000 kilograms or more of . . . marijuana . . . or (viii) 50 grams or more of methamphetamine . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. . . .

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of . . . heroin; (ii) 500 grams or more of . . . cocaine; (iii) 5 grams or more of . . . cocaine base [crack]; (iv) 10 grams or more of . . .PCP; (v) 1 gram or more . . . LSD; 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide (synthetic heroin) . . .(vii) 100 kilograms or more of . . . marijuana . . . or (viii) 5 grams or more of methamphetamine. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. . . .

(C) In the case of a controlled substance in schedule I or II . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or

$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana . . . such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

18 U.S.C. 924(c)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

List of Federal Crimes
Transformed by *Apprendi*
(Factors Establishing Separate Crimes:
Enhanced Sentences)

18 U.S.C.36(drive-by shooting: (b)(1) generally - not more than 25 years, (b)(2) if a killing results - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.37(violence at international airports: (a) generally - not more than 20 years; if death results - death, life imprisonment, or any term of years)

18 U.S.C.38(b)(fraud involving aircraft or space vehicle parts in interstate or foreign commerce: (4) generally - not more than 10 years and/or a fine; (1) if fraud involved a part installed in a aircraft or space vehicle - not more than 15 years and/or a fine;; (2) if bodily injury results - not more than 20 years and/or a fine; (3) if death results - life, any term of years and/or a fine)

18 U.S.C.43(animal enterprise terrorism: (a) generally - not more than 1 year and/or a fine; (b)(1) if serious bodily injury results - not more than 10 years and/or a fine; (b)(2) if death results - death, life imprisonment, or any term of years)

18 U.S.C.111(assault of federal officers or employees: (a) simple assault - not more than 1 year and/or a fine; (a) other assaults - not more than 3 years and/or a fine; (b) if a deadly or dangerous weapon is used or bodily injury inflicted - not more than 10 years and/or a fine)

18 U.S.C.112(a)(assault on foreign dignitaries: (a) generally - not more than 3 years and/or a fine; (b) if a deadly or dangerous weapon is used or bodily injury inflicted - not more than 10 years and/or a fine)

18 U.S.C.113(a)(assault within the special maritime and territorial jurisdiction: (1) with the intent to commit murder - not more than 20 years; (2) with the intent to commit any other felony - not more than 10 years; (3) with a dangerous weapon and the intent to do bodily harm - not more than 10 years and/or a fine; (4) by striking or wounding - not more than 6 months and/or a fine; (5) simple assault generally -not more than 6 months and/or a fine; (5) simple assault if the victim is less than 16 years of age - not more than 1 year and/or a fine with the intent to commit any other felony - not more than 10 years; (6) resulting in serious bodily injury - not more than 10 years and/or a fine; (7) resulting in substantial bodily injury to a victim under 16 years of age -not more than 5 years and/or a fine)

18 U.S.C.241(conspiracy against civil rights: generally - not more than 10 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.242(deprivation of civil rights under color of law: generally - not more than 1 year and/or a fine; if bodily injury results or the offenses involves the use of weapons, explosives or fire - not more than 10 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.245(deprivation of federally protected activities: generally - not more than 1 year and/or a fine; if bodily injury results or the offenses involves the use of weapons, explosives or fire - not more than 10 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.247(damage to religious property: (4) generally - not more than 1 year and/or a fine; (3) if bodily injury results or the offenses involves the use of weapons, explosives or fire - not more than 20 years and/or a fine; (2) if bodily injury results or the offenses involves the use of explosives or fire - not more than 40 years and/or a fine; (1) if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.831(transactions in nuclear material: (b)(1)(ii) generally - not more than 20 years; (b)(1)(i) if death results - life or any term of years; (b)(2) conspiracy generally - not more than 10 years; (b)(2) conspiracy to violate where death results - not more than 20 years)

18 U.S.C.844(i)(use of explosives to destroy property affecting interstate commerce: generally - not less than 5 nor more than 20 years and/or a fine; if injury results - not less than 7 nor more than 40 years and/or a fine; if death results death, life imprisonment, or imprisonment for any term of years)

18 U.S.C.1033(crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce: (a)(2) false statements generally - not more than 10 years; false statements that endanger an insurer -not more than 15 years; (b)(2) embezzlement generally - not more than 10 years; embezzlement that endanger an insurer - not more than 15 years; (c)(2) fraud generally - not more than 10 years; fraud that endanger an insurer - not more than 15 years)

18 U.S.C.1091(genocide: (b)(2) generally - not more than 20 years and/or a fine of not more than $1 million; (b)(1) if death results - death, life imprisonment, and/or a fine of not more than $1 million)

18 U.S.C. 1341 (mail fraud: generally - not more than 5 years and/or a fine of not more than $250,000; if the offense affects a financial institution - not more than 30 years and/or a fine of not more than $1 million)

18 U.S.C. 1343 (wire fraud: generally - not more than 5 years and/or a fine of not more than $250,000; if the offense affects a financial institution - not more than 30 years and/or a fine of not more than $1 million)

18 U.S.C. 1347 (health care fraud: generally - not more than 10 years and/or a fine; if serious bodily injury results - not more than 20 and/or a fine; if death results - imprisonment for life or any term of years and/or a fine)

18 U.S.C. 1361 (destruction of government property: generally - not more than 1 year; if property damage exceeds $1000 - not more than 10 years)

18 U.S.C. 1363 (malicious mischief within the special maritime and territorial jurisdiction: generally - not more than 5 years and/or a fine; if the property is a building or human life is jeopardized - not more than 20 years and/or a fine)

18 U.S.C. 1425 (procurement of citizenship unlawfully: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1426 (reproduction of citizenship papers: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1427 (sale of citizenship papers: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1503(b) (influencing or injuring federal officer or juror: (3) generally - not more than 10 years and/or a fine; (2) if attempted murder or the victim is a juror in a class A or B felony cases - not more than 20 years and/or a fine; (3) if a killing - the penalties imposed for murder and manslaughter under 18 U.S.C. 1111, 1112 (death, life imprisonment, any term of years, not more than 10 years, not more than 6 years))

18 U.S.C. 1541 (issuance of passport or visa without authority: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1542 (false statement in application and use of passport: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1543 (forgery or false use of passport: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1544 (misuse of passport: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1546 (fraud and misuse of visas, permits, and other entry documents: generally - not more than 15 years and/or a fine; if the offense does not involve facilitation of drug trafficking or international terrorism - not more than 10 years and/or a fine; if the offense involves facilitation of drug trafficking - not more than 20 years and/or a fine; if the offense involves facilitation of international terrorism -not more than 25 years and/or a fine)

18 U.S.C. 1581 (peonage: generally - not more than 20 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C. 1583 (enticement into slavery: generally - not more than 20 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.1584(sale into involuntary slavery: generally - not more than 20 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.1589(forced labor: generally - not more than 20 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.1590(trafficking with respect to peonage, slavery, involuntary servitude, or forced labor: generally - not more than 20 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - death, life imprisonment, any term of years, and/or a fine)

18 U.S.C.1591(sex trafficking of children or by force, fraud or coercion: (b)(2) tracking without force, fraud or coercion in children 14 years of age older - not more than 20 years or a fine; (b)(1) trafficking in children under 14 or by using or force, fraud or coercion - life, any term of years, and/or a fine)

18 U.S.C.1791(prison traffic in contraband: (1) if a narcotic - not more than 20 years and/or a fine; (2) if a firearm or schedule I or II controlled substance other than marijuana or a narcotic - not more than 10 years and/or a fine; (3) if marijuana, a weapon other than a firearm, or a schedule III controlled substance - not more than 5 years and/or a fine; (4) if an alcoholic beverage, other controlled substance, or currency - not more than 1 year and/or a fine; (5) other contraband - not more than 6 months and/or a fine)

18 U.S.C.1864(hazardous or injurious devices on federal lands: (5) generally - imprisonment for not more than 1 year and/or a fine; (4) if property damage results or avoidance costs exceed $10,000 - not more than 20 years and/or a fine; (3) if bodily injury results - not more than 20 years and/or a fine; (2) if serious bodily injury results - not more than 40 years and/or a fine; (1) if death results - life, any term of years, and/or a fine)

18 U.S.C. 1952(a)(interstate and foreign travel or transportation in aid of racketeering enterprises (Travel Act): (B) interstate travel to commit a crime of violence in furtherance of racketeering generally - not more than 20 years and/or a fine; (B) if death results - life or any term of years)

18 U.S.C. 1958(use of interstate commerce facilities in the commission of murder-for-hire: generally - not more than 10 years and/or a fine; if personal injury results - not more than 20 years and/or a fine; if death results - death, life and/or a fine)

18 U.S.C.1992(train wrecking: (a) generally - not more than 20 years and/or a fine; (b) if death results - death or life imprisonment; if train is carrying nuclear material - life or any term of years not less than 30)

18 U.S.C. 2114(robbery of mail or property of the United States: generally - not more than 10 years and/or a fine; if the custodian's life is jeopardized by use of a dangerous weapon or the custodian is wounded - not more than 25 years)

18 U.S.C.2118(robberies and burglaries involving controlled substances: (a),(b) generally - not more than 20 years and/or a fine; (c)(1) a dangerous weapon is used to assault or place the life of another in jeopardy during the course of the offense - not more than 25 years and/or a fine; (c)(2) if another person is killed - any term of years or life)

18 U.S.C. 2261(b)(interstate domestic violence: (5) generally - 5 years and/or a fine; (3) if serious bodily injury results - not more than 10 years and/or a fine; (2) if maiming or life threatening injury results - not more than 20 years and/or a fine; (1) if death results - life or any term of years)

18 U.S.C. 2262(b)(interstate violation of protection order: (5) generally - 5 years and/or a fine; (3) if serious bodily injury results - not more than 10 years and/or a fine; (2) if maiming or life threatening injury results - not more than 20 years and/or a fine; (1) if death results - life or any term of years)

18 U.S.C.2280(a)(1)(violence against maritime fixed platforms: generally - not more than 20 years and/or a fine; if death results, death, life or any term of years)

18 U.S.C.2281(a)(1)(violence against maritime fixed platforms: generally - not more than 20 years and/or a fine; if death results, death, life or any term of years)

18 U.S.C.2319(criminal copyright infringement: (b)(3) for commercial gain generally - not more than 1 year and/or a fine; (1) for commercial gain if offenses involves 10 or more copies having a value of more than $2500 - not more than 5 years and/or a fine; (c)(3) involving works have a value of more than $1000 generally - not more than 1 year and/or a fine; (1) involving works have a value of more than $1000 and involving 10 or more copies having a value of more than $2500 - not more than 3 years and/or a fine)

18 U.S.C.2340A(torture: generally - not more than 20 years and/or a fine; if death results death, life, or any term of years)

21 U.S.C.841(a),(b)(see text, *supra)*

21 U.S.C.960(a),(b)(replicates, for smugglers, the trafficker sentencing provisions of 21 U.S.C. 841(a), (b))

42 U.S.C.3631(Fair Housing Act violations: generally - not more than 1 year and/or a fine; if bodily injury results or the use of dangerous weapons, explosives or fire are involved - not more than 10 years and/or a fine; if death results or the offense involves kidnaping, attempted kidnaping, rape, attempted rape, or attempted murder - life or any term of years, and/or a fine).

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